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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DANA K. FERRELL, Plaintiff and Appellant, v. COUNTY OF SAN DIEGO, Defendant and Appellant.	D034864 (Super. Ct. No. 723783)

APPEALS from a judgment of the Superior Court of San Diego County, Thomas R. Murphy, Judge. Affirmed in part; reversed in part and remanded with directions.

Dana K. Ferrell appeals a judgment awarding him damages in his inverse condemnation action against the County of San Diego (County). Ferrell contends the trial court erred by (1) excluding the testimony of his appraisal expert, and (2) not awarding him certain costs and attorney fees under Code of Civil Procedure section 1036.[1] County filed a cross-appeal and contends the trial court erred by (1) denying its motion for judgment notwithstanding the verdict (JNOV), (2) denying its alternative

1 All statutory references are to the Code of Civil Procedure unless otherwise specified.

motion for a new trial, (3) awarding Ferrell an excessive amount of prejudgment interest, and (4) awarding Ferrell excessive costs and attorney fees under section 1036. Because there is insufficient evidence to support the jury's award of $189,078.33 in mitigation damages, we reverse the judgment to the extent it awarded those damages, and prejudgment interest on those damages, and remand with directions for the trial court to grant County's JNOV motion, award Ferrell a total of $1,890.74 in damages, and redetermine the amounts of costs, fees and prejudgment interest awarded to Ferrell.

FACTUAL AND PROCEDURAL BACKGROUND

In 1988 Ferrell bought two adjacent lots (Property) in Lakeside for $550,000. The Property was zoned A-70 for residential and agricultural use. It abuts Highway 67 and is in a relatively flat valley. Ninety percent of the Property is within a flood plain, which means that in the event of a 100-year flood up to 90 percent of the Property would be flooded to a depth of up to 10 feet of water.[2] There is a house on a raised one-acre pad on the Property. Ferrell bought the Property with the intent to develop it as a construction material recycling center. At the time he bought the Property, he was aware that to develop it for that intended use he must import fill dirt to raise its elevation above the flood plain elevation and construct a drainage channel.

At the time of Ferrell's purchase of the Property, Reid Enniss owned 42 acres of property that bordered the northern side of, and shared a 1,445-foot property line with,

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[2] The phrase "100-year flood" or storm event is used to describe what happens, on average, once every 100 years and reflects a method of predicting rain or water flows.

the Property. Ferrell knew that Enniss was planning to develop his property by placing fill dirt on it to raise its elevation above the flood plain elevation and constructing one-half of a drainage channel with a fill slope along its boundary with the Property. Enniss's plans were approved by County.[3] Ferrell planned to create the other half of the drainage channel by raising the elevation of the Property with fill dirt, with a fill slope creating the other one-half of the drainage channel at the boundary of the Enniss property.

Enniss placed 800,000 cubic yards of fill dirt on his property, raising its elevation about ten feet above the Property's elevation. By raising the elevation of his property, Enniss redirected the historical flow of surface water, increasing the flow of water onto the Property. However, Enniss did not grade his property in conformance with the plans approved by County. He placed the slope for one-half of a drainage channel on the Property rather than on his property.

In 1992 Ferrell filed an action alleging a trespass cause of action against Enniss and an inverse condemnation cause of action against County.[4] In 1993 Enniss and Ferrell entered into a settlement agreement (Settlement), pursuant to which Enniss paid Ferrell $60,000 and Ferrell granted Enniss an irrevocable letter of permission (ILOP) allowing his slope bank encroachment on the Property, and dismissed the action against him.

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3 County also apparently rezoned Enniss's property from agricultural to heavy industrial use.

4 The second amended complaint filed on July 15, 1992, also alleged a nuisance cause of action against both Enniss and County.

In the first phase of a bifurcated trial, the trial court found that County was liable to Ferrell for inverse condemnation by approving, and accepting for public use, Enniss's grading and drainage improvements that increased the flow of surface water onto the Property. In the second phase of the trial, a jury awarded Ferrell zero damages for inverse condemnation.[5] On appeal, we affirmed the trial court's finding that County was liable for inverse condemnation, but reversed the jury's award of zero damages because of instructional error. (*Ferrell v. County of San Diego* (June 17, 1998, D024043) [nonpub. opn.].) We held: "[A]t retrial, the instructions should not give the option of awarding zero damages since at a minimum an adjudicated taking supports an award of nominal damages." (*Id*. at p. 2.)

On remand, a second jury trial on the issue of damages for inverse condemnation was conducted. The trial court granted Ferrell's in limine motion to exclude evidence of the Settlement. Following an Evidence Code section 402 hearing, the trial court granted County's motion to exclude the testimony of John Mawhinney, Ferrell's appraisal expert, because his expert testimony was not supported by a proper foundation. Ferrell testified that he incurred $189,078.33 in costs in unsuccessfully applying for a major use permit (MUP) that would have allowed him to develop and use the Property for a construction material recycling plant; he claimed those costs were incurred to mitigate the damages caused by County's inverse condemnation of the Property. The trial court instructed the jury that it could only consider awarding Ferrell mitigation damages. The jury returned a

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[5] The jury awarded Ferrell $10,000 for emotional distress based on his nuisance cause of action against County. The trial court separately awarded Ferrell $1,889.74 in

verdict awarding Ferrell $189,078.33. The trial court denied County's motions for JNOV or, alternatively, a new trial. Ferrell filed a memorandum of costs and a motion for awards of his costs, attorney fees and prejudgment interest. County moved to tax Ferrell's requested costs and opposed Ferrell's attorney fees motion. The trial court granted in part and denied in part Ferrell's motion for costs, attorney fees and interest. It entered judgment for Ferrell and against County for a total amount of $646,132.02, consisting of: (1) $1,889.74 in stipulated damages; (2) $189,078.33 for mitigation damages awarded by the jury; (3) $6,667.08 for ordinary costs; (4) $195,956.83 in prejudgment interest; and (5) $252,540.04 for section 1036 costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees.

Ferrell timely filed a notice of appeal, and County timely filed its notice of cross-appeal.

DISCUSSION

I

The Trial Court Did Not Abuse Its Discretion by Excluding Mawhinney's Expert Testimony

Ferrell contends the trial court erred by excluding Mawhinney's expert testimony. He argues that the trial court's ruling excluding evidence of the Settlement required exclusion of evidence that Enniss had constructed one-half of the drainage channel. Therefore, Mawhinney properly assumed that Ferrell would be responsible for constructing the entire drainage channel between Enniss's property and the Property, an

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mitigation damages on his inverse condemnation cause of action.

assumption that formed the basis of Mawhinney's opinion on the diminution of the Property's value caused by County's inverse condemnation.

A

The normal measure of just compensation in most inverse condemnation cases is the diminution in the fair market value of the property taken or damaged. Under unusual circumstances, the alternative measure of cost of repair is necessary for just compensation. (*Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 807-808.) However, cost of repair, or cost to cure, damages generally may not exceed the diminution in the fair market value of the property inversely condemned. (*Id*. at p. 810.) "If the cost of . . . restoration ('cost to cure') is less than the diminution in market value [that] would result from the permanent removal of the improvement, then the former, rather than the latter, will be the measure of the damage. But cost to cure is a measure of damage only when it is no greater in amount than the decrease in the market value of the property if left as it stood. [Citation.]" (*People ex rel. Dept. Pub. Wks. v. Flintkote Co.* (1968) 264 Cal.App.2d 97, 106.)

B

At trial Ferrell testified that he was responsible for constructing his half of a drainage channel that would be required for development of the Property for use as a recycling center, but he would also be obligated to pay the cost of Enniss's half of the drainage channel. Kenneth Discenza, Ferrell's engineering expert, testified that the total cost to construct the entire drainage channel would be $1,117,750 and therefore Ferrell's

cost to cure damages was one-half of that cost, or $558,875. To recover this cost to cure it must be less than the diminution in value of the Property caused by County's action.

As support for his claim that the amount of cost to cure damages was less than the diminution of the fair market value of the Property, Ferrell proffered the testimony of appraisal expert Mawhinney on the diminution in value of the Property because of County's action. County filed an in limine motion to exclude Mawhinney's expert testimony because it was not supported by a proper foundation. At an Evidence Code section 402 hearing, Mawhinney testified that his opinion on diminution in value of the Property was based in part on the assumption that a hypothetical buyer of the Property would be responsible for the cost of constructing the entire drainage channel, including Enniss's half. Based on that assumption, Mawhinney concluded that the diminution in the value of the Property caused by County's action was $880,000. However, he also testified that if a hypothetical buyer of the Property was not responsible for the cost of constructing the entire channel, but for only the cost of constructing the one-half required for development of the Property, there would be no diminution in the value of the Property because of County's inverse condemnation.

County argued that Mawhinney's testimony should be excluded because it was based on a false factual assumption that a buyer of the Property would bear the cost of constructing the entire channel. Ferrell argued that the existence of the slope or one-half channel on Enniss's side should be ignored or excluded from evidence because Enniss constructed that slope pursuant to the terms of the Settlement, evidence of which was excluded by the trial court, and admission of evidence on that slope's existence would, in

effect, give County an improper offset for consideration received by Ferrell pursuant to the Settlement. The trial court granted County's motion to exclude Mawhinney's expert testimony because it was based on an improper assumption and did not have a proper foundation. It noted that one-half of the channel already had been constructed by Enniss and therefore Mawhinney could not assume that an entire channel would need to be constructed by a hypothetical buyer of the Property.

C

Ferrell argues Mawhinney properly assumed that a buyer of the Property would have to pay the cost of constructing the entire channel. However, the record does not support the premise of Ferrell's argument. Our review of the Settlement shows it *did not obligate* Enniss to construct half of a drainage channel.[6] Rather, it *permitted* Enniss to

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6 The only reference in the Settlement to Enniss's side of the drainage channel was set forth in paragraph 5: "Pursuant to the terms of the ILOP, if and when a drainage channel is constructed on the Ferrell Property, with one bank of the channel consisting of the slope constructed on the Ferrell Property pursuant to the ILOP, the owners of the Enniss Property will be responsible for installing any required Rip Rap along the slope created pursuant to the ILOP." Paragraph 2.1 of the ILOP provided: " . . . Ferrell hereby gives to Enniss the exclusive and irrevocable right and *permission* to enter onto the Ferrell Property from time to time for the purpose of construction and maintaining slopes for the benefit of the Enniss Property, which slopes shall be in the approximate location as disclosed on Exhibit 'C' attached hereto and incorporated herein by this reference. Without limiting the generality of the foregoing, Enniss *shall be permitted* to place fill dirt upon Ferrell's Property and to perform grading, compacting and other work as may be necessary or desirable *to construct the slopes* in the approximate location disclosed on Exhibit 'C' attached hereto, and Enniss *shall be permitted* to extend the existing drainage pipes through said slopes and after construction of said slopes and drainage pipes, may enter onto the Ferrell Property from time to time as determined by Enniss . . . to maintain said slopes and said drainage pipes *for the benefit of the Enniss Property*. . . ." (Italics added.)

do so and continue his encroachment on the Property.[7] Furthermore, the record shows that Enniss had constructed that half of the channel before Ferrell filed the instant action, which led to the Settlement. Ferrell's second amended complaint alleged that, pursuant to County's approval of Enniss's grading plan, Enniss performed grading and improvements to his property creating "a 'wall' along the common property boundary [with the Property that] . . . diverts the natural flow of . . . waters onto [the Property]." It further alleged, "By approving Enniss's grading plan, the County caused Enniss's property to be filled and graded in a manner creating a 'wall' along the common boundary of the properties." The record does *not* support Ferrell's premise that Enniss was required by the Settlement to construct his half of the drainage channel. To the extent Enniss's half of the channel was constructed before, or after, the Settlement, that construction by Enniss was *not* consideration given by him to Ferrell pursuant to the Settlement. To the contrary, it was the construction by Enniss of half of the drainage channel that constituted the basis of Ferrell's inverse condemnation claim. Ferrell's position would award him the cost of the conduct that caused damage to the Property, a cost that is unrelated to the diminution caused in the fair market value of the Property or the cost to cure the damage. The cost to cure the problem is the cost to build Ferrell's half of the drainage channel, which he concedes is his responsibility, not to build Enniss's half, which is the cause of the problem. Furthermore, even had Ferrell received Enniss's construction of half of the channel as part of the consideration he received under the Settlement, the trial court's

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[7] Because of this interpretation of the Settlement, we also reject Ferrell's argument that by allowing evidence on Enniss's half of the channel, the trial court improperly gave

exclusion of the terms of the Settlement did not require exclusion of evidence on the current physical existence of half of the drainage channel on Enniss's side.[8] Although evidence of the terms of the Settlement may have been appropriately withheld from the jury, it was not improper or inconsistent to apprise the jury of the existence of Enniss's half of the drainage channel, and to deny it that knowledge would require the jury to decide a hypothetical case that did not exist in fact.[9] We conclude that the trial court properly found that Mawhinney's expert opinion was based on an improper factual assumption and did not abuse its discretion by excluding his testimony because it did not have a proper foundation.[10] (*City of San Diego v. Sobke* (1998) 65 Cal.App.4th 379, 395; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.)

County an offset for consideration received by Ferrell under the Settlement.

8 Although Ferrell asserted at trial, and asserts on appeal, that Enniss had not completed construction of his half of the channel, he submitted no evidence at trial to support that assertion.

9 As the trial court noted, Ferrell could not "have it both ways," successfully moving to have the Settlement excluded from evidence and then arguing that pursuant to the Settlement it paid for Enniss's half of the channel, thereby allowing Mawhinney to assume a buyer of the Property would also have to pay for that half.

10 Had Mawhinney based his expert opinion on proper factual assumptions and the reality that Enniss's half of the channel already existed, he would have testified that Ferrell had suffered no diminution in the fair market value of the Property because of County's action. On cross-examination, Mawhinney was asked what his opinion would be if a hypothetical buyer of the Property did not have to bear the cost of constructing half of the channel on Enniss's side; he replied there would be no diminution in the fair market value of the Property based on that assumption. Therefore, Ferrell could not recover his alleged cost to cure damages because they would exceed the diminution in the value of the Property (i.e., $0).

Ferrell also asserts that the trial court erred by denying his request to reopen and testify that under the Settlement he gave Enniss consideration for the cost of Enniss's construction of half of the channel. He argued that under the Settlement he gave up about $500,000 in claims against Enniss in exchange for Enniss's construction of his slope. However, the trial court concluded County was not bound by the Settlement and denied Ferrell's request to reopen. Ferrell argues he could have shown his cost to cure damages consisted of the consideration he purportedly paid or gave Enniss under the Settlement. However, he does not show the trial court abused its discretion by not allowing him a "second bite at the apple" after his first chosen bite (i.e., exclusion of evidence of the Settlement) proved not to be so palatable. In any event, as noted *ante*, the face of the Settlement does not support Ferrell's assertion that Enniss constructed his half of the channel in exchange for anything Ferrell may have given up (e.g., trespass or nuisance claims).

II

The Trial Court Properly Denied Ferrell's Requests for Section 1036 Costs and Fees

Ferrell contends the trial court erred by denying his requests under section 1036 for: (1) attorney fees incurred on the first appeal; (2) Mawhinney's fees; and (3) costs, disbursements and expenses that generally would not be allowed under section 1033.5. Section 1036 provides: "In any inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation . . . shall determine and award or allow to the plaintiff, as a part of that judgment . . . , a sum that will, in the opinion of the court, reimburse the plaintiff's reasonable costs, disbursements, and expenses, including

reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding."

A

Ferrell asserts the trial court erred by denying as untimely his request for attorney fees incurred in the first appeal in this matter. On July 1, 1999, after conclusion of the second trial on damages, Ferrell requested, inter alia, $17,725 in attorney fees incurred in the appeal and cross-appeal of the judgment in the first trial.[11] County opposed Ferrell's request for attorney fees incurred in the prior appeal, arguing that his request was untimely under California Rules of Court, rule 870.2(c).[12] The trial court agreed with County that Ferrell's request was untimely.

During 1998 when we decided the first appeal in this matter (in our June 17, 1998, opinion), rule 870.2 provided:

> "(a) *Except as otherwise provided by statute, this rule applies in civil cases to claims for statutory attorney fees* and claims for attorney fees provided for in a contract. [¶] Subdivisions (b) and (c) apply when the court determines entitlement to the fees, the amount of the fees, or both, whether the court makes that determination because the statute or contract refers to 'reasonable' fees, because it requires a determination of the prevailing party, or for other reasons.
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> "(b) A notice of motion to claim attorney fees for services up to and including the rendition of judgment in the trial court shall be served

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11 The judgment in the first trial on damages awarded Ferrell $1,889.74 in mitigation damages on his inverse condemnation cause of action and $10,000 in emotional distress damages on his nuisance cause of action.

12 All references to rules are to the California Rules of Court.

> and filed within the time for filing a notice of appeal under rules 2 and 3. [¶] The parties may, by stipulation filed before the expiration of the above time, extend the time for filing a motion for attorney fees until 60 days after the expiration of the time for filing a notice of appeal or, if a notice of appeal is filed, until the time within which the memorandum of costs must be served and filed under rule 26(d). [¶] For good cause, the trial judge may extend the time for filing a motion for attorney fees in the absence of a stipulation, or for a longer period than allowed by stipulation.
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> "(c) *A notice of motion to claim attorney fees on appeal under a statute* or contract requiring the court to determine entitlement to the fees, the amount of the fees, or both, *shall be served and filed within the time for serving and filing the memorandum of costs under rule 26(d).*"[13] (Italics added.)

Rule 26(d) provides: "A party who claims costs awarded by a reviewing court shall, *within 40 days after the clerk of the reviewing court mails that party notice of the issuance of the remittitur*, serve and file in the trial court a memorandum of costs . . . ." (Italics added.)

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13 Effective as of January 1, 1999, rule 870.2 was amended to provide in pertinent part: "(b)(1) A notice of motion to claim attorney fees for services up to and including the rendition of judgment in the trial court--including attorney fees on an appeal before the rendition of judgment in the trial court--shall be served and filed within the time for filing a notice of appeal under rules 2 and 3. [¶] (2) The parties may by stipulation filed before the expiration of the time allowed under subdivision (b)(1) extend the time for filing a motion for attorney fees (i) until 60 days after the expiration of the time for filing a notice of appeal; or (ii) if a notice of appeal is filed, until the time within which a memorandum of costs must be served and filed under rule 26(d). [¶] (c)(1) A notice of motion to claim attorney fees on appeal--other than the attorney fees on appeal claimed under subdivision (b)--under a statute or contract requiring the court to determine entitlement to the fees, the amount of the fees, or both, shall be served and filed within the time for serving and filing the memorandum of costs under rule 26(d). [¶] (2) The parties may by stipulation filed before the expiration of the time allowed under subdivision (c)(1) extend the time for filing the motion up to an additional 60 days. [¶] (d) For good cause, the trial judge may extend the time for filing a motion for attorney fees in the absence of a stipulation or for a longer period than allowed by stipulation."

Under the express provisions of rules 870.2(c) and 26(d), a party claiming a statutory right to attorney fees on appeal must serve and file a motion to claim fees within 40 days after the clerk of the appellate court mails to that party a notice of issuance of the remittitur. "Judicial Council rules have the force of statutes to the extent that they are not inconsistent with legislative enactments or constitutional provisions. [Citation.]" (*Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1723-1724.) Because Ferrell claimed a statutory right under section 1036 to attorney fees incurred on appeal of the judgment following the first trial, he was required to file his motion for those fees within 40 days after this court's clerk mailed the notice of issuance of the remittitur after our June 17, 1998, opinion was filed in that appeal.[14] Section 1036 does *not* contain a provision precluding the application of rule 870.2(c).

Ferrell's section 1036 right to request attorney fees incurred on the first appeal did not first arise when the trial court entered its judgment following the second trial on damages; rather, it arose when we entered our judgment in the first appeal on June 17, 1998, and the matter was remanded to the trial court for further proceedings. Section 1036's phrase "the court rendering judgment for the plaintiff by awarding compensation" should not be read so narrowly to exclude an opinion by an appellate court concluding, as we concluded in our opinion in the first appeal, that a plaintiff is entitled to an award of damages based on a government entity's established liability for inverse condemnation.

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[14] Although the record in this appeal does not contain a copy of that notice, we presume, and the parties do not dispute, that the notice of issuance of the remittitur was mailed to Ferrell by the clerk of this court on or shortly after June 17, 1998.

Furthermore, our opinion did not reject the $1,889.74 in mitigation damages awarded by the trial court after the first trial. "The filing of the [appellate court's] opinion, which concludes with a statement of the judgment, constitutes the *rendition of the judgment on appeal*. [Citations.]" (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 722, p. 755, original italics.) A plaintiff who successfully shows on appeal that he or she is entitled to an award of damages for inverse condemnation should not have to wait to recover attorney fees incurred on that appeal until a judgment is entered following a retrial on the issue of damages. We also note that the language in section 1036 cited by Ferrell was contained in the original version of that statute before it was amended in 1995 to provide for a right to attorney fees incurred on appeal, in addition to its original provision regarding attorney fees incurred during trial. Although the Legislature did not rewrite section 1036's language to expressly cover appellate court judgments following successful appeals in inverse condemnation actions, we interpret section 1036's amended version entitling a plaintiff to an award of reasonable attorney fees incurred "in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding" to provide a successful plaintiff with a right to reasonable attorney fees incurred on appeal immediately on the issuance of the remittitur in that appeal. (Cf. *Walsh v. New West Federal Savings & Loan Assn.* (1991) 234 Cal.App.3d 1539, 1547 [motion for attorney fees for trial was not premature even though notice of appeal of judgment was filed].)

Ferrell's motion for attorney fees incurred in the first appeal was required to be served and filed near the end of July 1998, or well before the July 1, 1999, date on which Ferrell first filed a motion for those attorney fees. Because Ferrell did not serve and file

his motion for attorney fees incurred in the first appeal within the period required by rules 870.2(c) and 26(d), the trial court properly denied as untimely his motion for those attorney fees. (Cf. *Nazemi v. Tseng* (1992) 5 Cal.App.4th 1633, 1637-1641 [award of attorney fees for trial reversed because motion for those fees was untimely filed].)

B

Ferrell asserts the trial court erred by denying his section 1036 request for an award of Mawhinney's fees. However, his assertion is premised on the assumption that the trial court erred by excluding Mawhinney's testimony. Because we concluded that the trial court properly excluded Mawhinney's testimony, it did not err by denying Ferrell's request for an award of Mawhinney's fees.

C

Ferrell asserts the trial court erred by denying his section 1036 request for an award of $12,248.77 for certain costs, disbursements and expenses that generally are not considered ordinary costs under section 1033.5.[15] Ferrell's requested section 1036 costs, disbursements and expenses included mileage, postage, telephone charges, photocopying expenses, attorney service charges, meals, parking fees, certain court reporter fees, and fees paid to County's expert for deposition time. County opposed Ferrell's request, arguing that section 1036 did not provide for awards of costs that are not ordinary costs under section 1033.5. The trial court denied Ferrell's request, stating:

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15 The trial court granted Ferrell's separate request for an award of $6,667.08 for ordinary costs.

> "With respect to the 'additional disbursements' sought as part of item 11 that total $12,248.77, the court denies the request. Attachment 2 to the [Memorandum] of Costs shows that the costs include items not allowable under CCP § 1033.5 (i.e.[,] postage, [tele]phone charges, photocopying). Plaintiff cites no authority that CCP § 1036 preempts the requirements of CCP § 1033.5 as to what costs are allowable. Additionally, the costs include miscellaneous expert fees [that] are not supportable."

Ferrell asserts that section 1036 provides for awards of costs, disbursements and expenses that are not limited to ordinary costs under section 1033.5. However, he does not cite any authority that supports his position. Instead, he argues that the language of section 1036 shows that its costs provisions were intended to be broader than section 1033.5's provisions. Section 1036 provides for an award of reasonable "costs, disbursements, and expenses" incurred by a successful plaintiff in an inverse condemnation action. Ferrell argues that the Legislature would not have used the phrase "costs, disbursements, and expenses" if it had intended to limit section 1036's provisions to costs. Ferrell argues that the Legislature, by including the additional words "disbursements" and "expenses," intended to expand the range of costs, disbursements and expenses beyond section 1033.5 ordinary costs.

We are not persuaded by Ferrell's proposed interpretation of section 1036. The word "disbursement" means funds paid out, and the word "disburse" means to expend or pay out. (Webster's 3d New Internat. Dict. (1981) p. 644.) The word "expense" is defined as cost or the financial burden involved typically in a course of action.

(Webster's, *supra*, at p. 800.)[16] The word "cost" means the expenditure or outlay of money, time, or labor, and the word "costs" is defined as expenses incurred in litigation. (Webster's, *supra*, at p. 515.) Therefore, the words "disbursements" and "expenses" have meanings that are the same as, or at least substantially similar to, the word "costs." We conclude that the Legislature, by using the phrase "costs, disbursements, and expenses" in section 1036, did *not* intend that phrase to have a broader meaning than the word "costs."

Furthermore, by comparison, in an *eminent domain* action that is similar to an inverse condemnation action, a property owner also has a statutory right to recover costs incurred in defending the action. Section 1268.710 provides: "The defendant[s] shall be allowed their costs . . . ." Before section 1268.710 was enacted in 1975, its predecessor statute, former section 1255, similarly provided for awards of costs to eminent domain defendants.[17] *People v. Bowman* (1959) 173 Cal.App.2d 416, 418 rejected the argument that former section 1255 allowed awards of costs other than ordinary costs:

> "Although [former section 1255] does not specify what items may be included in costs allowed thereunder, our courts have held that they are the same as those available in ordinary civil actions under section 1032, Code of Civil Procedure [citation], which *allows only the ordinary and usual costs* attending trials [citation] . . . ." (Italics added.)

In enacting section 1268.710 in 1975, the Legislative Committee commented: "[T]he defendant in an eminent domain proceeding has as a rule been allowed his ordinary court

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16 We also note that the word "expenditure" means disbursement or expense. (Webster's, *supra*, at p. 800.)

17 Former section 1255 provided: "[C]osts may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court."

costs." Therefore, in eminent domain proceedings, a property owner is entitled to ordinary costs under section 1032 (and its related provision section 1033.5), and not *extraordinary* costs. There appears to be no logical reason to award an inverse condemnation plaintiff broader costs than an eminent domain defendant may be awarded. We conclude that, absent an express statutory provision so stating, section 1036 does not provide for awards of costs that are not considered ordinary costs under section 1033.5. The trial court did not abuse its discretion by denying Ferrell's request under section 1036 for an award of $12,248.77 for costs, disbursements and expenses that are not ordinary costs under section 1033.5.

CROSS-APPEAL

III

The Trial Court Erred by Denying County's Motion for Judgment Notwithstanding the Verdict (JNOV)

County contends there is insufficient evidence to support a finding that Ferrell's MUP expenses were reasonable mitigation damages, and the trial court therefore erred by denying its motion for JNOV. County alternatively argues that on remand after the first appeal in this case the trial court was without jurisdiction to consider Ferrell's MUP expenses as mitigation damages.

A

During the second trial on damages, the trial court allowed Ferrell to present evidence of $189,078.33 in expenses he incurred in unsuccessfully applying for an MUP that would have permitted him to develop the Property for a construction material

recycling center.[18] Those expenses included engineering fees, attorney fees, environmental specialist fees, lobbyist fees and costs. Ferrell's MUP application included plans for construction of a drainage channel that would be for the sole purpose of controlling diverted drainage. Ferrell argued that his MUP expenses were incurred to mitigate the damages caused by County's inverse condemnation of the Property by approving Enniss's development. Ferrell admitted that he bought the Property on April 16, 1988, with the intent of developing it and had seen Enniss's development plans before that date. He also knew before that date that Enniss had begun grading his property. Ferrell admitted that within three weeks after he bought the Property, he completed plans for developing the Property for use as a recycling center. However, he claimed that those plans were an "attempt[] to provide a cure" (apparently for the *problem* caused by Enniss's development). He testified that because of County's approval of Enniss's development, a drainage channel would be necessary on the Property to control the flow of water and make use of the Property. Ferrell began his development plans before he bought the Property and knew that a zoning change or MUP would be required for that development.

The trial court instructed the jury:

> "As a result of certain rulings made by the court, the plaintiff's claim for damages for the jury to consider is limited to expenses the plaintiff contends he incurred in undertaking reasonable efforts to mitigate damages. The other claims made by plaintiff are no longer to be considered by you.

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[18] During the first trial on damages in this case, a different judge excluded evidence of these expenses, finding they were not recoverable as mitigation damages.

> "You are required to determine, one, whether plaintiff has incurred mitigation expenses, and; two, the reasonable amount of mitigation expenses incurred.
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> "If you find that the plaintiff has not incurred mitigation expenses, plaintiff is entitled to nominal damages; that is, $1.00.
>
> "The finding of liability should not prejudice you for or against the County.
>
> "Mitigation expenses are those expenses, if any, incurred by plaintiff in undertaking reasonable efforts to prevent or minimize further damage to his property. Plaintiff is entitled to recover such damages even if the efforts to mitigat[e] were unsuccessful.
>
> "You may not award as a mitigation expense those expenses Ferrell would incur to protect his property against drainage that historically flowed upon his property before the Enniss development."

The jury returned a verdict awarding Ferrell $189,078.33 in mitigation damages on his inverse condemnation claim against County.

County filed a motion for JNOV, arguing that there was insufficient evidence to support a finding that Ferrell's MUP expenses of $189,078.33 were reasonable mitigation damages. The trial court denied County's JNOV motion.

B

Section 629 provides that a trial court, on its own motion or on a motion of a party against whom a verdict has been rendered, shall enter judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted. "'The scope of appellate review of a trial court's denial of a motion for judgment notwithstanding the verdict is to determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the

jury's conclusion and where so found to uphold the trial court's denial of the motion. [Citations.] [¶] . . . When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]. [Citations.]' [Citation.]" (*Pusateri v. E. F. Hutton & Co.* (1986) 180 Cal.App.3d 247, 250.) However, *substantial* evidence is not synonymous with *any* evidence; it must be reasonable in nature, credible, and of solid value. (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871.) An appellate court may disregard evidence in support of a verdict if it is inherently improbable. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 367, p. 417.)

C

Considering the evidence favorably to support the verdict and making all reasonable inferences in support thereof, we conclude there is insufficient evidence to support a finding that Ferrell's MUP expenses of $189,078.33 constituted reasonable mitigation damages.[19]

"[A]n owner whose property is being taken or damaged by a public entity is under a duty to take all reasonable steps available to minimize his loss. [Citations.]" (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 269.) "[E]xpenses [that] the owner reasonably and in good faith incurs in an effort to minimize his loss are to be taken into account in computing the 'just compensation' awarded to him in a proceeding in eminent

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19 During the second trial on damages, the parties stipulated that Ferrell incurred $1,889.74 in mitigation damages, for Ferrell's expense in obtaining an emergency grading permit. County does not appeal the judgment to the extent it awarded the stipulated amount of $1,889.74 in mitigation damages.

domain. [Citations.]" (*Id*. at p. 270.) Expenses reasonably and prudently incurred in a proper effort to prevent or diminish injury are recoverable as mitigation damages even though those efforts are unsuccessful. (*Id*. at pp. 270-271.) Mitigation efforts must be reasonably warranted by and in proportion to the injury and consequences to be averted. (*Id*. at p. 271.) *Albers* stated:

> "If, in accordance with the general rule and the dictates of public policy, the duty to mitigate damages is held to apply in eminent domain cases, the fair market value of the property taken or damaged will be *decreased* by the amount [that] the owners reasonably and in good faith spend in discharging that duty. . . . It is therefore unnecessary to draw a technical distinction between designating this amount as a separate item of damages or merely placing it on the debit side in computing the fair market value of the property after the taking; in either event the result will be the same." (*Id*. at p. 273, original italics.)

In this case Ferrell's efforts in applying for an MUP to permit development and use of the Property for a recycling center cannot reasonably be inferred to constitute reasonable mitigation efforts. County's action of approving Enniss's development plan allowed Enniss to place fill dirt on his property, thereby increasing the historical flow of water onto the Property. Ferrell's testimony shows that he bought the Property with the intent to develop it; he did not buy the Property with an intent to continue its agricultural and residential uses for which it was zoned. He knew that a zoning change or MUP would be required to allow him to effect his development plans. He also knew that Enniss's approved plans provided for the placement of fill dirt on Enniss's property and construction of one-half of a drainage channel adjacent to the Property. Although Ferrell's MUP application included plans for construction of a drainage channel,

Discenza, Ferrell's engineering expert, admitted that a drainage channel would not be required to allow continued use of the Property for agricultural purposes. Ferrell did not show that he suffered any economic loss or diminution in value of the Property because of County's inverse condemnation. It is illogical to allow Ferrell to recover expenses purportedly incurred to mitigate inverse condemnation damages that do not exist.

Furthermore, expenses incurred to develop a property for its highest and best use generally are not recoverable as mitigation damages. (*Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc.* (1978) 77 Cal.App.3d 742, 765.) Ferrell incurred his MUP expenses in an unsuccessful attempt to change the Property's current use and to develop it for a higher and better use as a recycling center. Although part of the MUP application included placing fill dirt on the Property and the construction of one-half of the drainage channel, those features were merely incidental to the sole purpose of the MUP application from its inception--to allow Ferrell to develop the Property for use as a recycling center as he intended on (and even before) the date he bought the Property. It cannot reasonably be inferred from the evidence that Ferrell intended in good faith that his MUP application would be a reasonable and proportionate effort to cure the relatively minimal damage caused to the Property by Enniss's development. The construction of the drainage channel was only an incidental part of Ferrell's development plans under his MUP application. Assuming arguendo that Ferrell actually intended his MUP expenses to be incurred as an effort to mitigate damages caused by County's inverse condemnation, we conclude that those efforts and expenses were not reasonable mitigation efforts and expenses in the circumstances of this case. Ferrell's planned placement of fill dirt on the

Property and construction of the remaining half of the drainage channel was not a reasonable effort to mitigate the damage of an increased flow of water onto the Property because of Enniss's development. Therefore, we conclude there is insufficient evidence to support a reasonable inference that Ferrell's MUP expenses were incurred for reasonable mitigation efforts for damage caused by County's action in approving Enniss's development. The trial court erred by denying County's JNOV motion. We reverse the trial court's order denying that motion and direct it on remand to issue a new order granting that motion. That grant of the JNOV motion will result in reversal of the jury's verdict awarding Ferrell $189,078.33 as damages for his MUP costs. However, that reversal of the damages award will not require, or even allow, an award of zero damages for County's liability for taking or damaging the Property in inverse condemnation. Rather, as we held in our opinion in the first appeal, Ferrell is entitled to an award of, at least, nominal damages for taking or damaging the Property. *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 390, fn. 4, stated: "Where an owner is unable to prove that the taking or damaging of property by a governmental entity has caused him any economic injury, he is entitled to recover only nominal damages. [Citations.] Upon remand the trial court may assess the nominal damages." Because Ferrell has not shown he is entitled to an award of substantial damages for County's taking or damaging the Property, on remand the trial court shall award him an appropriate amount of $1 as

nominal damages for that claim, in addition to the $1,889.74 in mitigation damages to which the parties stipulated during the second trial on damages.[20]

IV

The Trial Court's Award of Prejudgment Interest Must Also Be Reversed

Because the award of $189,078.33 in damages is reversed it necessarily follows that the trial court's award of prejudgment interest on those damages must also be reversed. Therefore, we need not address County's alternative contention that the trial court erred in calculating the amount of prejudgment interest on the damages awarded following the second trial. However, on remand the trial court shall award Ferrell appropriate prejudgment interest on its award of $1,889.74 in stipulated mitigation damages.

V

On Remand, the Trial Court Should Also Reconsider the Amounts of Costs and Attorney Fees Awarded to Ferrell

On remand the trial court will grant County's JNOV motion and enter a new judgment awarding Ferrell a total of $1,890.74 in damages on its inverse condemnation claim against County rather than the $190,968.07 amount awarded after the second trial on damages. The trial court's award of costs and attorney fees also must be reversed. Because Ferrell will receive only nominal damages on his takings claim and only

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[20] Because we reverse the $189,078.33 damage award on grounds that the trial court erred by denying County's JNOV motion, we need not address County's alternative contentions that: (1) on remand after the first appeal the trial court lacked jurisdiction to consider Ferrell's MUP expenses as mitigation damages; and (2) the trial court erred by denying its motion for a new trial.

$1,889.74 in mitigation damages, the trial court should reconsider the amounts of costs and attorney fees it originally awarded Ferrell and determine the appropriate amounts to be awarded him in the circumstances of this case.

Because Ferrell was successful in showing that County effected a taking or damaging of the Property for which it is liable in inverse condemnation for nominal damages, he has a right to an award of reasonable costs and attorney, appraisal, and engineering fees incurred in obtaining that favorable result. (§ 1036; *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 376; *Orme v. State of California ex rel. Dept. Water Resources* (1978) 83 Cal.App.3d 178, 185; *City of Los Angeles v. Ricards*, *supra*, 10 Cal.3d at p. 391; *Collier v. Merced Irr. Dist.* (1931) 213 Cal. 554, 572.) "Determination of [the] amount of fees and costs [awarded under section 1036] is within the sound discretion of the trial court. [Citations.]" (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 950.)

DISPOSITION

The judgment is affirmed, except that the order denying the motion for judgment notwithstanding the verdict and the awards of $189,078.33 in damages for inverse condemnation and prejudgment interest thereon are reversed. The matter is remanded with directions that the trial court: (1) issue a new order granting the motion for judgment notwithstanding the verdict; (2) award the appellant a total of $1,890.74 in damages on his inverse condemnation claim; and (3) redetermine the amount of costs, fees and

prejudgment interest awarded to the appellant. The parties shall bear their own costs and fees on appeal.

McDONALD, J.

WE CONCUR:

KREMER, P. J.

HUFFMAN, J.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DANA K. FERRELL, Plaintiff and Appellant, v. COUNTY OF SAN DIEGO, Defendant and Appellant.	D034864 (Super. Ct. No. 723783) ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION

THE COURT:

The opinion filed June 8, 2001, is ordered certified for publication with the exception of Discussion, part I, part II (A and B), part III, part IV and part V.

The attorneys of record are:

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John J. Sansone, County Counsel, William A. Johnson, Jr. and Timothy M. Barry, Deputy County Counsel for Defendant and Appellant.

KREMER, P. J.